IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 247

IRWIN STEINGUT and HAROLD E. BLODGETT, as Receivers of the Assets in New York of Russo-Asiatic Bank,

Respondents,

against

GUARANTY TRUST COMPANY OF NEW YORK,

Respondent,

and

JAMES A. TILLMAN,

Petitioner,

and

JESSE C. MILLARD and UNITED STATES OF AMERICA,

Respondents.

BRIEF AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BORRIS M. KOMAR and
DAVID L. SPRUNG,
Counsel for Petitioner.

INDEX

TABLE OF CASES

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the United States:

James A. Tillman, a citizen of the United States, prays the issuance of a writ of certiorari to the United States Circuit Court of Appeals to the United States Circuit to review the judgment of that Court rendered on May 7,

1947, which affirmed the judgment of the District Court for the Southern District of New York (R. 288-9) in this and in two companion actions, *U. S. Guaranty Trust Co.*, which were tried together and which were appealed upon a single record (R. 3115-7).

Statement of Matter Involved

James A. Tillman, an American national, and a resident of New York, on August 24, 1927, levied a warrant of attachment on the dollar indebtedness of defendant, Guaranty Trust Co., to Russo-Asiatic Bank, a Russian corporation, at its main office in New York, in the sum of $188,408 (R. 1658). The warrant was levied in an action by petitioner, as plaintiff, in the Supreme Court, Queens County, against Russo-Asiatic Bank, as defendant.

On September 23, 1935, judgment was entered in Supreme Court, Queens County, in favor of petitioner and against Russo-Asiatic Bank for $210,675.05 (R. 124-128).

On March 9, 1936, the District Court allowed petitioner to intervene in this action on the ground that he had a claim to the account of the Russo-Asiatic Bank against Guaranty Trust Co., both because of his 1927 attachment lien, and because of his state judgment of September 23, 1935 (R. 76-87). Petitioner thereupon filed an answer and a cross bill in equity and counterclaim against the receivers and defendant Guaranty Trust Co. for the said amount of his lien and the judgment (R. 88-123).

In 1927, neither the Government of the United States nor the State of New York recognized Soviet Government or its laws, and Russo-Asiatic Bank, a corporation organized under the laws of the Russian Imperial Government, was deemed by the law and the courts of New York to continue to exist and function as such corporation, not-

withstanding any Soviet legislation to the contrary. Subsequent to the recognition of the Soviet Government by the Government of the United States on November 16, 1933, the recognition terms accepted both by the American Government and the Soviet Government expressly excepted from the effects thereof acts done in the United States by any of its nationals relating to property credits or obligations of any government of Russia or nations thereof. Thus, the recognition terms expressly left valid and in force petitioner's attachment lien on the dollar indebtedness due to Russo-Asiatic Bank from Guaranty Trust Co.

On November 16, 1933 (the Soviet recognition date), the first outstanding attachment was that of Equitable Trust Co. for $500,000 which was not vacated or discharged until October 7, 1935, when an order to that effect was entered in the New York Supreme Court for New York County (R. 1663). One of the orders obtained in the petitioner's action by Messrs. Evarts, Choate, Sherman & Leon, the attorneys, who appeared for the Russo-Asiatic Bank, but whom the New York courts held unauthorized (*T'ssaia* v. *Russo-Asiatic Bank,* 266 N. Y. 37), was an interlocutory order of April 28, 1933 purporting to vacate ex parte petitioner's warrant of attachment (R. 417). Thereafter, by an order made on September 20, 1935, New York Supreme Court holding that a warrant of attachment was duly granted to petitioner and was duly levied on the indebtedness of Guaranty Trust Co. to Russo-Asiatic Bank and that petitioner complied with all other requirements of New York law and submitted proper proof of his causes of action, directed that a judgment should be entered in his favor in the sum of $210,497.20 (R. 2755-2757), which was done.

Under New York law, the lien of petitioner's attachment merged in the judgment, but the date of that lien

related back to August 24, 1927, when the attachment was levied. Furthermore, under New York law, when the immediately preceding attachment of Equitable Trust Co. was vacated on October 7, 1935, releasing $500,000 of attached funds of Russo-Asiatic Bank, the said attached sum became immediately subjected to petitioner's attachment lien, as the next succeeding attachment in priority. In other words, at the time of the assignment of the funds of Russo-Asiatic Bank made by the Soviet Government to the United States on November 16, 1933, there was a valid and subsisting attachment lien for $500,000 on the indebtedness of Russo-Asiatic Bank from Guaranty Trust Co. which, by operation of New York law, thereafter enured and became applicable to the discharge of petitioner's attendant lien.

The Courts below denied to petitioner the benefits of the Fifth Amendment to the Federal Constitution and of the "Full Faith and Credit" clause therein on the ground that "Tillman is beset with procedural difficulties" in the State Court (R. 9305), as if procedural difficulties in the State Court affected the applicability of said constitutional provisions to his lien and his State judgment.

Companion Applications for Certiorari

Irwin Steingut and Harold E. Blodgett, the New York receivers of Russo-Asiatic Bank, have applied for writ of certiorari in this case. The Guaranty Trust Company also filed its petition for writ of certiorari in the two companion actions of *U. S.* v. *Guaranty Trust Co.*

Basis of Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. Sec. 347 (a). The judg-

ment of the Circuit Court of Appeals was filed on May 7, 1947 (R. 3571-4).

The application of this petitioner for writ of certiorari is based on the record on appeal filed in this Court on August 1, 1947, by Guaranty Trust Company of New York in its application for a writ of certiorari, in the cases of *U. S.* v. *Guaranty Trust Co.* jointly tried with and appealed from below on a single record with this case, as well as on the record filed by the receivers in their said application for a writ of certiorari in this case.

Questions Presented

1. Do the Federal policy and the provisions of the Fifth Amendment to the Federal Constitution permit application by the Federal Courts of the Soviet confiscatory decrees against the lien of the petitioner, an American national, duly levied under New York State law on dollar deposits of Russo-Asiatic Bank with Guaranty Trust Company in New York State?

2. Is an outstanding attachment lien duly levied under New York State law by an American national before November 16, 1933 (the Soviet recognition date) against the dollar accounts of Russo-Asiatic Bank with Guaranty Trust Co. in New York City, superior to the confiscatory title of the United States acquired under the Litvinov assignment?

3. Can an American national be deprived of a valid lien acquired under state law against property located in the State by a Federal executive agreement?

4. Can Federal courts examine into "procedural difficulties" in the state court and refuse to give "Full Faith and Credit" to a valid and outstanding state judgment, unattacked for fraud or lack of jurisdiction?

5. Can Federal courts refuse the application of the state statutes to an attachment lien secured under the state law providing that the senior attachment liens inure for the benefit of junior attachment liens in the order of their priority?

6. Can the Federal courts under "Full Faith and Credit" clause of the Federal Constitution examine into the decision of the state court vacating *nunc pro tunc* interlocutory orders, because entered by unauthorized attorneys, affecting the lien of attachment secured under state law and forming the basis of a valid and subsisting state judgment?

Reasons for Allowing the Writ

1. In the *U. S.* v. *Pink,* 315 U. S. 203, and in *U. S.* v. *Belmont,* 301 U. S. 324, this Court expressly left open for future determination the question whether under the Litvinov agreement of November 16, 1933 the Soviet nationalization decrees or any similar foreign decrees of confiscatory nature, should be given extra-territorial effect so as to reach property rights duly acquired in the United States under American laws prior to November 16, 1933.

The question is squarely presented for decision in this case since the petitioner, an American national, was deprived by the decision below of a vested lien in the New York assets of Russo-Asiatic Bank acquired under New York law both by virtue of the attachment and by virtue of the state judgment based thereon. The decision below conflicts with the settled public policy of the United States against confiscation (*Compania Espanola* v. *Navemar,* 303 U. S. 68, 75; *Ingenohl* v. *Olsen & Co.,* 273 U. S. 541, 544-5; *Second Russian Insurance Co.* v. *Miller,* 268 U. S. 552; *Baglin* v. *Cusenier Co.,* 221 U. S. 580; *Lehigh Valley R. Co.* v. *State of Russia,* 21 Fed. (2nd) 296, 401, cert. den. 275 U. S. 571), which extends the bene-

fit of the Fifth Amendment to the Federal Constitution even to friendly aliens (*Russian Volunteer Fleet* v. *U. S.*, 282 U. S. 481; *Truax* v. *Raich*, 239 U. S. 233, 239; *U. S.* v. *Wong Kim Ark*, 169 U. S. 649, 695; *Wong Wing* v. *U. S.*, 163 U. S. 228, 242; *Yick Wo* v. *Hopkins*, 118 U. S. 356, 369), let alone to the petitioner, an American citizen.

In a case involving the scope of the operation of the Litvinov assignment, this Court held that it did not wipe out even an existing technical defense of an American national, still less a property lien of a citizen of the United States, in which category petitioner's lien falls (*Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 143).

The Litvinov assignment expressly excepted from its operation "*acts done* or settlements made by or with the Government of the United States or public officials in the United States or its nationals, *relating to property, credits, or obligations of* any government of Russia or *nationals thereof*" (Exhibit 26). Hence, petitioner's lien, a property right of an American citizen, lawfully acquired by him on August 24, 1927 (R. 746), five years prior to the Soviet assignment to the Government against Russo-Asiatic Bank, a Russian national, is not affected either by the assignment or by any other provision of the Litvinov agreement.

A lien is a property within the meaning of the Fifth Amendment. (*Worthen Co. ex rel. Board of Com'rs* v. *Kavanaugh*, 295 U. S. 56, 60; *Panhandle Eastern Pipe Line Co.* v. *State Highway Commission*, 294 U. S. 613, 618; *Worthen Co.* v. *Thomas*, 292 U. S. 426, 432; *Central Savings Bank* v. *City of New York*, 279 N. Y. 266, 277; *Stuart* v. *Palmer*, 74 N. Y. 183, 189.)

2. The Courts below failed to hold that outstanding attachments against New York assets of Russo-Asiatic Bank and the judgments thereon based, obtained in New York state courts, constituted a fatal impediment to the

claim of the United States, The Courts below failed to apply New York substantive law as to New York attachment liens and the effect of levies made thereunder, thereby violating the rule in *Erie R. Co.* v. *Tompkins,* 304 U. S. 64. (*Embree* v. *Hanna,* 5 Johns. 101; *Prahl Construction Corp.* v. *Jeffs,* 126 Misc. 802; *Edison Electric Co.* v. *Guastavino Co.,* 16 A. D. 350; *Lynch* v. *Carey,* 52 N. Y. 181; *Frost* v. *Mott,* 34 N. Y. 253; *Matter of Dawson,* 110 N. Y. 114, 118; *McGuire* v. *Ross,* 11 Abb. Pr. N. S. 20; and *West Virginia Pulp & Paper Co.* v. *People's Home Journal,* 233 A. D. 376.)

3. The Courts below misapplied the "Full Faith and Credit" provisions of the Federal Constitution. The rule for the application of said clause is well established. It bars every consideration of any matters which the Courts entering judgment had or should have passed upon in order to direct a judgment. No procedural difficulties or irregularities may be considered by the Federal Court, asked to enforce a judgment of a State Court unimpeached for lack of jurisdiction or for fraud. The Federal Court conclusively assumes that the judgment was regularly entered in the State Court, unless impeached for lack of jurisdiction or for fraud. (*White* v. *Crow,* 110 U. S. 183, 189; *McGoon* v. *Scales,* 79 U. S. 23, 31.)

The Courts below denied to the petitioner his constitutional privileges, because, allegedly, his prosecution of the state action was "beset by procedural difficulties" (R. 9305). The Federal Courts cannot inquire into mere procedural or other irregularities in the State Court occurring prior to the entry of the state judgment (none are mentioned in the opinions of the Courts below, and none appear in the record herein). (*Cooper* v. *Reynolds,* 10 Wall 308, 315-16; *Fox* v. *McGrath,* 152 Fed. (2) 616-7).

4. The Courts below declared that on November 16, 1933, "no attachment was in effect against any property

of Russo-Asiatic in the hands of Guaranty Trust" (R. 9309). The undisputed evidence in the record shows that on that date there were the following attachments levied under the dollar account of Russo-Asiatic Bank with Guaranty Trust Company in New York City:

> Equitable Trust Co. for $500,000 on January 13, 1920; Herbert J. Grant on March 13, 1933 for $537,515.80; Jesse C. Millard on March 28, 1933, for $200,000; and Estate of Serge Friede on September 25, 1933, for $800,000 (R. 1658).

It is settled law that an assignment subsequent to the levy of an attachment is subject to and inferior in title to the prior attachment lien. (*Tilton* v. *Cofield,* 93 U. S. 163, 168; *Hovey* v. *Elliot,* 118 N. Y. 134, 138; *West Va. Pulp & Paper Co.* v. *People's Home Journal,* 233 A. D. 375, 378-9; *McGinn* v. *Ross,* 11 Abb. Pr. N. S. 20, 26.)

Under sections 960, 961, 681, 680, of New York Civil Practice Act, all of these attachments inured for the benefit of petitioner, a prior attaching creditor for $188,408 (*Lopez* v. *Campbell,* 163 N. Y. 340, 349; *Gillig* v. *Treadwell Co.,* 148 N. Y. 177, 180-1; *Pach* v. *Gilbert,* 124 N. Y. 612, 620-1; *Wheeler* v. *Smith,* 11 Barb. 345, 347).

Apart from overlooking the above important facts, the Courts below gave undue importance to the erroneous ex parte order of the State Court made on April 28, 1933, temporarily vacating petitioner's warrant of attachment (R. 9309-10). Said order was vacated on July 13, 1935 (R. 412, 420). "The entry of the (interlocutory) order vacating the attachment did not annul the warrant of attachment" (*Norden* v. *Duke,* 47 Misc. 473). The interlocutory orders in New York have no force of *res judicata* (*Steuben Co. Bank* v. *Alberger,* 83 N. Y. 275, 278; *Riggs* v. *Pursell,* 74 N. Y. 370, 378-9; *Belmont* v. *Erie R. R. Co.,* 52 Barb. 637, 642).

Under the law of New York, when the ex parte order vacating petitioner's warrant of attachment was set aside, the warrant deemed to have existed in full force and effect all the time from its inception on August 24, 1927. "The effect of setting aside the order vacating the warrant of atachment was to give it validity in the hands of the Sheriff as of the date when it was issued." (*Pach* v. *Gilbert,* 124 N. Y. 612, 619; *Milliken* v. *Fidelity & Deposit Co.,* 129 A. D. 206, 214; *Fried* v. *Weissenthanner,* 27 Misc. 518-9.)

The ex parte order of April 28, 1933 was vacated on July 13, 1935, because it was procured by attorneys unauthorized to appear for the Russo-Asiatic Bank (R. 414, 416-7). The Russo-Asiatic Bank, being a non-resident foreign corporation in New York, any order procured in its behalf by unauthorized attorneys was void *ab initio.* The warrant of attachment remained in the same condition as if the ex parte proceedings had not been taken. (*Vilas et al.* v. *Plattsburgh & M. R. Co. et al.,* 123 N. Y. 440; *Amusement Securities Corp.* v. *Academy Pictures Distributing Corp.,* 251 A. D. 227; *Stock* v. *Mann,* 229 App. Div. 19, 20, aff'd 255 N. Y. 100; *Duimo* v. *Arbuckle,* Nos. 1 & 2, 166 App. Div. 86; *Myers* v. *Prefontaine,* 40 App. Div. 603; *Matter of Estate of Stephani,* 75 Hun. 188; *Nordlinger et al.* v. *De Mier et al.,* 54 Hun. 276.)

Prayer

For the foregoing reasons, your petitioner prays that a writ of certiorari issued out of this Court to the United States Circuit Court of Appeals for the Second Circuit commanding said Court to certify and send to this Court on a date to be designated, a full and complete transcript of the record as printed in the appendices to the briefs of Guaranty Trust Company and the United States, and

of all proceedings in the Circuit Court of Appeals had in this case, to the end that this case may be reviewed and determined by this Court, conformably to the review had in other important cases arising under the Litvinov assignment; that the judgment and decision of the Circuit Court of Appeals therein be reversed; and that your petitioner be granted such other and further relief as may be proper.

JAMES A. TILLMAN,
Petitioner.

By BORRIS A. KOMAR,
Solicitor for Petitioner,
36 West 44th Street,
New York 18, N. Y.

BORRIS M. KOMAR,
DAVID L. SPRUNG,
of Counsel.

New York, August 5, 1947.

Brief in Support of Petition

The petitioner in support of his petition relies upon authorities cited in the petition, and also hereby adopts the formal part of the brief and the argument presented under Point II (pp. 27-31) and Point IV (pp. 34-37) of the brief filed in support of the petition for writ of certiorari by Guaranty Trust Company of New York in the companion cases of *United States of America* v. *Guaranty Trust Company of New York.*

Respectfully submitted,

Borris M. Komar,
Counsel for Petitioner.

David L. Sprung,
of Counsel.

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 247

JAMES A. TILLMAN, PETITIONER

v.

IRWIN STEINGUT AND HAROLD E. BLODGETT, AS RECEIVERS OF THE ASSETS IN NEW YORK OF RUSSO-ASIATIC BANK; GUARANTY TRUST COMPANY OF NEW YORK; JESSE C. MILLARD; AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Steingut and Blodgett, as receivers of the assets in New York of Russo-Asiatic Bank, have filed a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, No. 245, this Term, seeking to review the judgment of that court which rejected their claim to the deposits formerly standing on the books of the Guaranty Trust Company in the name of the Russo-Asiatic Bank. Petitioner Till-

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man is an alleged creditor of the Russo-Asiatic Bank who intervened in the receivers' action and sought a judgment against Guaranty, but whose claim was likewise denied by the courts below; he seeks review here of that portion of the judgment below which denied him recovery. Neither Tillman nor the receivers were parties to the two companion actions by the United States against Guaranty Trust Company to recover the former Russo-Asiatic accounts, in which Guaranty now seeks review of the judgments below upholding the United States' claims, Nos. 239 and 240, this Term, and in which the United States is filing a conditional cross-petition (Nos. 313–314) concerning the allowance of interest.[1] Since the courts below denied the motions of the United States in the receivers' action for substitution and consolidation,[2] the United States did not litigate Tillman's right to relief in the lower courts. In our view, however, his claim is totally lacking in merit and was correctly denied by the courts below.

1. The relevant facts are these. Petitioner Tillman is an alleged creditor of Russo-Asiatic Bank, whose own claim arose out of dealings

[1] There was, however, a consolidated trial of the receivers' action and those brought by the United States. A full statement of the facts is contained in the United States' Brief in Opposition in Nos. 239 and 240, pp. 4–16.

[2] The United States is filing a conditional cross-petition (No. 315) in the receivers' action to review the denial below of its motions for substitution in or consolidation of its two separate actions against Guaranty with the receivers' action against Guaranty.

with Russo-Asiatic in Russia in 1918, and he is also assignee of claims assigned to him in 1927 by Russian nationals who likewise dealt with the Bank in Russia (R. 250–251, 3101).[3] He obtained issuance of a warrant of attachment out of a New York state court, in 1927, in an action against Russo-Asiatic, and purported to levy upon that Bank's accounts with Guaranty Trust Company on August 24, 1927, in the sum of $188,408 (R. 249–250, 3101, 3103).

After removal of Tillman's action to the United States District Court for the Eastern District of New York, an order was entered on June 26, 1928, with his consent, vacating the attachment (R. 251, 3103–3104). The cause proceeded to judgment against Tillman in the District Court, and on appeal, the Circuit Court of Appeals affirmed as to Tillman's own cause of action, and remanded the assigned claim to the state court. *Tillman* v. *Russo-Asiatic Bank,* 51 F. 2d 1023 (C. C. A. 2), certiorari denied, 285 U. S. 539. Upon remand, the attorneys appearing for the Russo-Asiatic Bank caused the entry in the state court, on April 28, 1933, of an order vacating the 1927 attachment, which order was affirmed by the state appellate courts (R. 139, 251, 3104). Thus, at the time of the Litvinov Assignment, on November 16, 1933, Tillman's attachment was not in effect.

[3] The references are to the record in Nos. 239, 240, and 245, covering the litigation out of which the present claim arises.

In 1935, on Tillman's motion, the state court struck out as unauthorized the appearance of the attorneys who had appeared for Russo-Asiatic in 1933, *nunc pro tunc,* and vacated the order of April 28, 1933, which had vacated the purported attachment. The United States did not participate in these proceedings. Shortly thereafter, Tillman secured a default judgment against Russo-Asiatic for $210,675.05, without appearance on behalf of the defendant (R. 251, 3104). An action brought in 1936 by Tillman, together with the sheriff as provided by New York practice (R. 3102–3103), to enforce the warrant of attachment purported to be levied in 1927 on Russo-Asiatic's accounts with Guaranty, was dismissed on the ground that it was barred by the statute of limitations applicable to suits to enforce attachments (*Tillman* v. *National City Bank and Guaranty Trust Co.,* 276 N. Y. 663; R. 252, 3103).

Tillman was permitted to intervene on March 9, 1936, in the suit commenced in 1919 by the emigré directors of Russo-Asiatic (R. 28–29, 251, 3101), and in December 1939 he filed a claim with the receivers founded upon the default judgment he had obtained in 1935 (R. 3101). Tillman did not seek to intervene in the actions by the United States against Guaranty (R. 3103).

2. On these undisputed facts, the courts below properly rejected Tillman's claim in its entirety. They held that his attachment could not be a "pre-

existing infirmity", subject to which the United States received the claim to the Russo-Asiatic accounts, because it was not in effect on November 16, 1933 (R. 3103). Moreover, *United States* v. *Pink,* 315 U. S. 203, determines that claims such as Tillman now seeks to enforce, arising from dealings with Russo-Asiatic in Russia, could not affect the rights of the United States in suits under the Litvinov Assignment, even where the claimant's purported attachment antedated November 10, 1933. See the United States' Brief in Opposition in Nos. 239 and 240, pp. 29–30, 32–33.

In sum, Tillman's claim is obviously without merit. It rests on a 1935 default judgment secured after the appearance of Russo-Asiatic's attorneys had been stricken as unauthorized. The purported attachment, which is sought to tie the claim to the present litigation, had been vacated before November 16, 1933, the date of the Litvinov Assignment, and suit to enforce the attachment, after its reinstatement in 1935, has already been held barred by the statute of limitations. Finally, the entire claim arises solely out of dealings with Russo-Asiatic in Russia.

It is respectfully submitted, therefore, that the present petition should not be granted whether or not the Court grants the petition of the receivers in No. 245, and the cross-petition of the United States in that action (No. 315). Even in the event that both those petitions are granted, adequate

grounds exist for denying the present petition, for Tillman's claim is plainly insubstantial and presents no significant question for review.

PHILIP B. PERLMAN,
Solicitor General.

SEPTEMBER 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL MEMORANDUM FOR JAMES A. TILLMAN, PETITIONER

BORRIS M. KOMAR,
Counsel for Petitioner.

Dated, N. Y., September 15, 1947.

INDEX

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL MEMORANDUM FOR PETITIONER

In their memorandum in opposition to the petition of James A. Tillman for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, the Government and the Guaranty Trust Company, otherwise bitter enemies in this litigation, have touchingly agreed that whether or not the petitions filed by them and the State receivers of the Russo-Asiatic Bank are granted by this Court, the petition of James A. Tillman should be denied. This touching unanimity is apparently dictated by a conviction of said respondents that they have nothing to fear on the merits from the allowance of the

appeal to the receivers and are apprehensive of the merits of the petitioner's claim, if it is reviewed in substance by this Court.

Both respondents state that "the facts" show that on the date of the Litvinov assignment (November 16, 1933), the petitioner had no outstanding attachment on the funds of Russo-Asiatic Bank in New York, as if the existence or non-existence of an attachment was a question of pure fact and not a question of law.

Petitioner's attachment is a lien created by New York statute, and its existence and non-existence is governed by the provisions of law creating it. Hence, if under the law of New York (which is set forth in Tillman's petition at pp. 8 and 9), and as this petitioner contends, the prior attachment of Equitable Trust Company for $500,000 and the subsequent attachments of Herbert J. Grant for $537,515.80, Jesse C. Millard for $2,000,000 and of the Estate of Serge Friede for $800,000 (R. 1658)* all existing on November 16, 1933, enured for the benefit of Tillman's attachment, whether or not it was inadvertently vacated on November 16, 1933, and thereafter reinstated, the Government took its assignment on that date, subject to Tillman's attachment as "a pre-existing infirmity" (*Guaranty Trust Co.* v. *U. S.*, 304 U. S. 126, 142).

If the Government took the Litvinov assignment to the New York funds of the Russo-Asiatic Bank, subject to the then existing attachments of Equitable Trust Company, Herbert J. Grant, Jesse C. Millard and the Estate of Serge Friede, and under New York law, the New York City Sheriff held the funds under said attachments for the benefit of Tillman, then Tillman, an American citizen, had a property right lawfully acquired under New York

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* The references are to the record under Numbers 239, 240, 245, tried on the same record with Number 237, and filed with the petitions in said applications.

law prior to November 16, 1933, and could not be deprived of that property right without violating the Fifth Amendment to the Federal Constitution.

Moreover, Tillman's property right referred to the property within the continental United States, and was clearly covered by the provisions of the Federal Constitution. It is idle to say that his claim arose from his transactions with the Russo-Asiatic Bank in Russia. All the funds of the Russo-Asiatic in New York came from the transactions of the Russo-Asiatic Bank in Russia. The Russo-Asiatic Bank was not domiciled in New York, never had an office in New York, and the Guaranty Trust Company was merely a New York correspondent bank of the Russo-Asiatic.

While technically the designation of Tillman's judgment as "a default" judgment is correct, the undisputed facts show that Tillman's claims prior to their remand to the State Court for lack of jurisdiction (*Tillman* v. *Russo-Asiatic Bank,* 51 Fed. (2) 1023, cert. den. 285 U. S. 539), had three trials on the merits in the United States District Court for the Eastern District of New York. One trial was before the District Judge of the equitable defenses of the Russo-Asiatic Bank, which were dismissed on the merits. The other two trials were of Tillman's claims themselves before a jury. Both trials resulted in verdicts in favor of Tillman, the jury bringing the verdict for the full amount of the claims on the second trial (R.767-71).

We submit that Tillman's claims stood up well against the test by trial at the time the Russo-Asiatic Bank was represented in Court by one of the leading and ablest law firms in New York: Messrs. Evarts, Choate, Sherman and Leon.

Still more trivial and groundless objection of the respondents is that based on the decision of New York

courts that the statutory remedy to enforce the attachment of Tillman, provided by Sections 922 and 943 of New York Civil Practice Act, was barred to Tillman by New York Statute of Limitations (*Tillman* v. *National City Bank and Guaranty Trust Company,* 276 N. Y. 663).

The New York Court of Appeals did not vacate Tillman's judgment and did not set aside his lien. It did not do so because the New York Statute (said Section 922) expressly provides that said statutory remedy is given to the Sheriff and the attaching creditor in addition to the common law remedies to enforce the attachment lien, the section reading that:

> "* * * the Sheriff, in aid of such attachment, also may maintain any other action against the attachment debtor and any other person or persons or against any other person or persons which may be maintained by a judgment creditor in equity. * * *"

Tillman's cross-claim against the Guaranty Trust Company herein is such judgment debtor's bill in equity (R. 88-134). Furthermore, the law of New York is well settled that the doctrine of dormancy does not apply to attachment, and the lapse of time does not destroy a lien once lawfully acquired. It is further the law of New York, that the expiration of the period of limitations for a statutory remedy to recover a debt does not impair the lien itself on property, either personal or real (*House* v. *Carr,* 185 N. Y. 453; *Hulbert* v. *Clark,* 128 N. Y. 295 where the New York Court of Appeals followed the decisions of this Court in *Hardin* v. *Boyd,* 118 U. S. 756, and *Lewis* v. *Hawkins,* 23 Wall. 119); *Riordan* v. *Ferguson,* 147 Fed. (2d) 983; *McCarthy* v. *Farley,* 149 Misc. (N. Y.) 360.

It is respectfully submitted therefore, that this petitioner's claim plainly presents substantial and important questions for review of this Court, because this petitioner,

at all material times had a valid attachment lien under New York law in the New York assets of Russo-Asiatic Bank, pre-existing the Litvinov assignment. Thus, the decision below deprived Tillman, an American citizen, of his property rights under the Fifth Amendment to the Federal Constitution, and denied him the enforcement of his existing state judgment under "Full Faith and Credit" Clause thereof.

Respectfully submitted,

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Dated, N. Y., September 15, 1947.